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Significant 1969 Amendments to the Kentucky Rules of Civil Procedure

By WATSON CLAY*

Effective July 1, 1969, a substantial number of amendments were made to the Kentucky Rules of Civil Procedure. The Rules had not been otherwise amended since 1963. One of the principal objectives pursued was to make our Kentucky Rules conform to the 1966 amendments of the Federal Rules. It has been the policy since 1953 to have our procedure conform as closely as possible to that in the federal courts so that lawyers could consistently practice in either court. The most significant changes are hereinafter considered under subject matter headings.

TIME.

Rule 6.01, relating to the computation of time within which to take some procedural step, was amended to add Saturday as a day which would not be counted in computing the time period. This conforms to the similar Federal Rule 6(a).

PLEADING—WAIVER OF DEFENSES.

Original Rules 12.07 and 12.08 had proved somewhat troublesome in delineating the method of presenting defenses and objections and in spelling out under what circumstances these defenses and objections were waived. The objective of these Rules has always been to discourage the piecemeal presentation of defenses and objections which would result in unnecessary delay in the completion of issues at the pleading stage. Rules 12.07 and 12.08 must be read together.

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Rule 12.07 relates to defenses and objections which may be raised *by motion*. The end sought is to require the *consolidation* of what may be termed "threshold" defenses and objections at one time. Except for (1) the defense of failure to state a claim upon which relief can be granted, or (2) the defense of failure to join a party indispensable under Rule 19, or (3) an objection of failure to state a legal defense to a claim (these are specified in Rule 12.08(2)), any defense or objection *then available to the pleader by motion* must be presented if the pleader makes a motion under Rule 12.

Seven *defenses* are set forth in Rule 12.02. What may be classified as *objections* appear in Rules 12.05 and 12.06 (motion for more definite statement, motion to strike). Thus *if a motion is made* raising *any* of these nine defenses or objections, all others then available are waived and cannot be later presented either by motion or by pleading except the two defenses and one objection above enumerated.

Section (1) of Rule 12.08 specifies four preliminary defenses which are *waived* if not presented by a motion under the circumstances described in Rule 12.07, or not included in a responsive pleading or an amendment thereof which Rule 15.01 permits as a matter of course. Those defenses are: (a) lack of jurisdiction over the person, (b) improper venue, (c) insufficiency of process and (d) insufficiency of service of process. (These are listed in Rule 12.02 as (2), (3), (4) and (5).) Thus, if a defendant presents *by motion* defense (a), he may not thereafter present any of the other three defenses *either* by motion or pleading. If no motion asserting any of these defenses or any other defenses or objections presentable by motion under Rule 12 is made, they may thereafter be raised by a pleading or amendment thereto permitted *as a matter of course* under Rule 15.01. Such defenses cannot be raised by a pleading which a party must obtain court permission to file.

PLEADING—COUNTERCLAIM FOR CONTRIBUTION OR INDEMNITY AGAINST A PLAINTIFF.

Rule 13.02 was amended to fill a gap in the Rules where a procedural device was lacking to present a particular type of

claim. Many cases have arisen in which a defendant sued by more than one plaintiff (usually in automobile accident cases) wished to assert a claim for indemnity or contribution against one of the plaintiffs. Since Rules 13.01 (compulsory counterclaims) and 13.02 (permissive counterclaims) related to *matured* claims, a defendant could not properly counterclaim for indemnity or contribution in the event one of the plaintiffs recovered judgment against him on the ground another plaintiff was partially or wholly responsible. The defendant could not assert this unmatured claim against a plaintiff under Rule 14.01 (which permits the pleading of an unmatured claim) as a *third party* because the plaintiff was already a party to the action. The amendment now corrects this pleading difficulty and allows the defendant to assert as a counterclaim an unmatured claim against one or more of the plaintiffs.

PARTIES.

In conformity with the 1966 amendments to the similar Federal Rules, Rules 19, 23 and 24 were completely revised. They relate respectively to the (1) joinder of persons needed for a just adjudication, (2) class actions and (3) intervention. All of these Rules of course contemplate multiple-party actions.

The original Rules were somewhat technical and were so worded as to cause some confusion. The amendments all take a pragmatic approach to the matter of insuring that parties who properly should be in a lawsuit are either joined or adequately represented. In each of these three Rules appears the significant phrase "as a practical matter." They attempt to substitute practical considerations for technical considerations.

The revision of Rule 19 did away with the technical classification of an "indispensable" party. The overriding consideration is to determine what parties could and should be properly joined so that an action may proceed to the adequate settlement of the rights involved.

Under Rule 19.01 the first requirement justifying joinder of a party is that he be subject to service of process, either personal or constructive. The next qualification is that complete relief cannot be accorded among those already parties in the absence of the one sought to be joined. Further, he must claim

an interest relating to the subject of the action and he must be so situated that the disposition of the action in his absence may, as practical matter, impair or impede his ability to protect that interest, or would leave any of those already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If the above circumstances exist, such a person should be made a party by the court. He may be designated a plaintiff or a defendant according to the nature of his interest.

If the joinder of a party would render the venue of the action improper and he makes such an objection, he shall be dismissed from the action. It may be noted here that under new Rule 19.04 this Rule is subject to the provisions of Rule 23, which relates to class actions.

PLEADING—RELATION BACK OF AMENDMENTS.

The important amendment to Rule 15.03 was to protect a plaintiff from the defense of limitations when he has sued the wrong party but the party whom he should have sued has already adequate notice and will not be prejudiced by the mistake. New section (2) of the Rule provides that an amendment changing the party against whom a claim is asserted *relates back* to the date of the original pleading if the new party (a) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, *and* (b) he knew or should have known that the action would have been brought against him but for the mistake in the identity of the proper party.

Rule 19.02 continues the pragmatic approach when a person encompassed by Rule 19.01 *cannot be made a party*. The question then presented is whether in equity and good conscience the court should dismiss the action or should permit it to proceed among the parties before it. If the situation requires dismissal, the absent person is then, simply for descriptive purposes, identified as "indispensable."

The Rule specifies what factors should be considered by the trial court. It also gives the court broad latitude to shape the relief that may be granted.

Rule 23, relating to class actions, was completely revised and conforms to the 1966 amendments to Federal Rule 23. The new Rule is quite specific in spelling out the conditions for the maintenance of a class action and the procedure to be followed.

Rule 23.01 specifies four prerequisites which must be present to justify the conduct of a proceeding as a class action. They are (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

If the prerequisites of Rule 23.01 are present, under Rule 23.02 a class action may be maintained only if, in addition, *at least one* of the following three conditions is met. They are either: (1) the prosecution of separate actions would create a risk of inconsistent or varying adjudications affecting individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or would create a risk of adjudications with respect to individual members which as a practical matter would be either dispositive of the interests of those not parties or would substantially impair or impede their ability to protect their interests; *or* (2) the party opposing the class has so acted that final injunctive relief or corresponding declaratory relief with respect to the class would be appropriate; *or* (3) the court finds that questions of law or fact common to the members predominate over questions affecting only individual members, and a class action is superior to other available methods for fair and efficient adjudication. Practical considerations which govern the court's exercise of discretion under item (3) are detailed.

Under Rule 23.03, section (1) provides that as soon as practicable after the commencement of an action brought as a class action the court shall determine *by order* whether it may be so maintained. This order may be conditional and may be altered or amended before a decision on the merits.

Section (2) of Rule 23.03 requires the giving of the best notice practicable under the circumstances if a class action is

maintained under item (3) of Rule 23.02. This is when questions of law or fact common to members of the class predominate over questions affecting them individually and the class action is superior to other methods of adjudication. The content of such notice is specified.

Section (3) of Rule 23.03 relates to the necessary provisions of a class action judgment, a differentiation being made between actions prosecuted on grounds specified in items (1), (2) or (3) of Rule 23.02.

Section (4) of Rule 23.03 authorizes the bringing or maintaining of a class action with respect to particular issues or the dividing of a class into subclasses.

Rule 23.04 relates to the conduct of the class action and gives the court broad discretion to determine the course of the proceedings, to impose conditions, and otherwise control the action by appropriate orders.

Rule 24 relates to intervention. Here again practical considerations are paramount. As provided in Rule 24.01, unless a statute confers an unconditional right to intervene, the court shall permit intervention if the applicant claims a legitimate interest in the subject of the action and its disposition may as a practical matter impair or impede his ability to protect that interest (assuming his interest is not adequately represented by existing parties). Eliminated from the Rule was the former provision that the applicant is, or may be *bound* by the judgment.

MOTIONS FOR JUDGMENT N.O.V. AND FOR A NEW TRIAL.

Rule 50.03 was completely revised and now conforms to the 1963 amendment of Federal Rules 50(c) and 50(d). The objective was to specify with more particularity procedure at the trial court level and in the Court of Appeals when *both* motions for judgment notwithstanding the verdict and for a new trial have been made.

Section (1) contemplates that the party moving for a judgment notwithstanding the verdict has also made a motion for a new trial. In such a situation, if the court *grants* the judgment, he shall also determine whether the motion for a new trial should be granted in the event the judgment is thereafter vacated or

reversed. The court is required to specify the grounds for thus conditionally granting or denying the new trial motion. Even if granted, this order does not affect the finality of the judgment.

If the judgment is reversed on appeal and the motion for a new trial has been conditionally granted, the new trial shall proceed unless the appellate court otherwise orders. In the event the court has conditionally denied the motion for a new trial, the party who was successful on his motion for judgment notwithstanding the verdict may assert such denial as error in the event the opposing party appeals. If the judgment is reversed on appeal, subsequent proceedings shall be as directed by the appellate court.

Section (2) simply permits a party whose verdict has been set aside on a motion for judgment notwithstanding the verdict to serve a motion for a new trial, as authorized by Rule 59, not later than 10 days after the judgment notwithstanding the verdict.

Section (3) provides that if the motion for judgment is *denied*, the party who successfully contested that motion may assert, in the appellate court, grounds which would entitle him to a new trial in the event the appellate court determines that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in Rule 50 precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to make such determination.

In order to invoke the alternative relief in the appellate court prescribed by this Rule, a cross-appeal would not be necessary.

INSTRUCTIONS TO JURY.

Rule 51 was completely revised for the purpose of clarifying the methods by which a party can preserve for appellate review objections to instructions. The former Rule, which conformed in some respects to Federal Rule 51, had proven awkward in application. Under the new Rule the lawyer can preserve for appellate review the propriety of the instructions in any of three ways by (1) tendering instructions, (2) moving the court to instruct or (3) making specific objections on specific grounds.

DESIGNATION OF RECORD ON APPEAL.

The timeliness of designating the record on appeal under Rule 75.01 has created many difficulties. The former Rule required the filing of the designation "promptly" after an appeal was taken. To avoid a controversy over the meaning of this rather elastic word, it was considered expedient to fix a definite time limit. It is now so fixed at "10 days after filing the notice of appeal." Lawyers are cautioned to comply strictly with this Rule as noncompliance may unfortunately result in dismissal of the appeal without consideration of its merits.

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In addition to the Rules above discussed, there were several other 1969 amendments to other Rules. For the most part they were editorial in nature and were adopted for clarification purposes.

These amendments became effective July 1, 1969. Under Rule 86(2) they of course govern all proceedings in actions brought after that effective date. They also govern further proceedings in actions *pending on that date* unless the proper court by order finds that their application would not be feasible or would work injustice.